

AMS CHANGE REQUEST (CR) COVERSHEET

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Title: Inverted Domestic Corporation Guidance

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Guidance and Policy must be submitted with separate CR coversheets.

Policy

Or

Procurement Guidance

Real Estate Guidance

Other Guidance

Summary of Change: Changes to guidance on inverted domestic corporations

Reason for Change: Clarifications to definition of inverted domestic corporation, and removal of FY applicability references consistent with statute.

Development, Review, and Concurrence: Acquisition Policy Division, Procurement Legal, and Contracts.

Target Audience: Contracting workforce and program offices

Briefing Planned: No.

ASAG Responsibilities: None.

Section / Text Location:

T3.2.2.7 – <http://fast.faa.gov/docs/procurementGuidance/guidanceT3.2.2.7.pdf>

The redline version must be a comparison with the current published FAST version.

I confirm I used the latest published version to create this change / redline

or

This is new content

Links: <http://fast.faa.gov/docs/procurementGuidance/guidanceT3.2.2.7.pdf>

Attachments: redline and final

FAST Version 10/2015

CR 15-57

p. 1

Other Files: N/A

Redline(s):

Sections Revised: 3.2.2.7.A.5 – Prohibition Against Contracting with Inverted Domestic Corporations

Procurement Guidance - (10/2015)

T3.2.2.7 - Contractor Qualifications Revised 1/2009

A Contractor Qualifications

1 Responsibility Determination of Prospective Contractors Revised 7/2012

2 Team Arrangements Revised 1/2009

3 Debarment and Suspension Revised 4/2013

4 Notices to GSA and SAM Revised 7/2012

5 Prohibition Against Contracting with Inverted Domestic Corporations Revised 10/2015

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C Forms

D Appendix 1 - Definitions Revised 10/2015

T3.2.2.7 - Contractor Qualifications Revised 1/2009

A Contractor Qualifications

1 Responsibility Determination of Prospective Contractors Revised 7/2012

a. *General Standards.* A responsible contractor:

- (1) Has or can obtain adequate financial resources to perform a contract;
- (2) Has the ability to meet any required or proposed delivery schedules;
- (3) Has a satisfactory performance history;
- (4) Has a record of integrity and proper business ethics;
- (5) Has appropriate accounting and operational controls that may include, but are not limited to:
 - (a) Production control;
 - (b) Property control systems;
 - (c) Quality assurance programs; and
 - (d) Appropriate safety programs; and
- (6) Is qualified and eligible to receive an award under applicable laws or regulations.

b. *Determination.*

- (1) The Contracting Officer's (CO) signature on a contract constitutes a determination that a prospective contractor is responsible with respect to that contract.
- (2) The burden of proof is on the prospective contractor to demonstrate its responsibility to perform under the terms of the contract.

c. *Obtaining Information.* When making a determination of responsibility, the CO should have, or obtain, information sufficient to be satisfied that a prospective contractor currently meets applicable standards. The CO should apply the following guidelines in collecting data/information:

- (1) Generally, the CO should obtain information on prospective contractors promptly after receipt of offers. Requests for information should ordinarily be limited to information from those offerors most likely to be considered for award, and may include requesting

preaward surveys. Depending on the circumstances, the CO may obtain this information before issuing the screening information request (SIR).

(a) A preaward survey may be useful when the information on hand or readily available to the CO is not sufficient to make a determination regarding responsibility. When the requirement is for smaller dollar amounts or commercial items, the CO should consider the cost of the preaward survey in relationship to the requirement.

(b) Preaward surveys should be managed and conducted by the surveying activity. Whether the surveying activity is within or outside of the contract administration office, the CO should obtain from the office or auditor:

(i) Any information required concerning the prospective contractor's financial competence and credit needs; and

(ii) The adequacy of the prospective contractor's accounting systems and the suitability of their use in administering the proposed type of contract.

(c) When a preaward survey discloses previous unsatisfactory performance, the surveying activity should specify the extent to which the prospective contractor has taken or plans corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance.

(d) The surveying activity may provide an abbreviated survey report when it possesses information that supports a recommendation of complete award without an on-site survey and no special area for investigation has been requested.

(e) Information on financial resources and performance capability should be current as of the date of award.

(f) The CO's request to the surveying activity should include:

(i) Additional factors about which information is needed;

(ii) The complete SIR package (unless it was previously been furnished), and any information indicating prior unsatisfactory performance by the prospective contractor;

(iii) A statement whether the contracting office will participate in the survey;

(iv) The date by which the report is required. This date should be consistent with the scope of the survey requested and normally should allow at least 7 working days to conduct the survey; and

(v) When appropriate, limitations on the scope of the survey.

(2) In addition to the preaward survey, the CO may use the following sources of information to support responsibility determinations:

(a) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

(b) The prospective contractor, including proposal information, questionnaire replies, financial data, information on production equipment, and personnel information.

(c) Other sources such as publications, suppliers, subcontractors, customers of the prospective contractor, and financial institutions; or

(d) If the contract is for construction, the CO may consider performance evaluation reports.

(3) The CO must review the "Exclusions" portion of the "Performance Information" capability in the System for Award Management (SAM) to ensure prospective contractors are not listed. (See Notices to SAM below).

(4) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully should promptly exchange relevant information.

d. *Documentation.* The CO should consider the following guidelines for documenting contractor responsibility determinations:

(1) A determination of responsibility requires no additional documentation beyond the CO's signature on the contract. Supporting documents such as the preaward survey reports, performance records, and related data/information should be included with other contract file documentation.

(2) If a prospective offeror who is otherwise eligible to receive an award is determined to be nonresponsible, the CO should insert signed documentation in the contract file supporting the nonresponsibility determination. Supporting documentation such as preaward survey reports, performance records, and related data/information should also be included in the file with the nonresponsibility determination.

(3) A nonresponsibility determination for a small business is processed in the same manner as for large businesses. There is no requirement to coordinate with the Small Business Administration (SBA); however the CO may choose to consult with FAA's Office of Small Business Development (OSBD) or local Small Business Development staff.

2 Team Arrangements Revised 1/2009

a. *General.*

- (1) Team arrangements are cooperative arrangements where:
 - (a) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - (b) A potential prime contractor enters into an agreement with one or more other companies to have them act as subcontractors under a specific contract.
- (2) Benefits of team arrangements to both FAA and an offeror or contractor include, but are not limited to:
 - (a) Increases competitive edge and presents a stronger position to FAA;
 - (b) Provides companies access to new markets and opportunities;
 - (c) Allows companies to collaborate and focus on their core capabilities;
 - (d) Brings differing skills and experience together into one solution for FAA;
 - (e) More opportunities for small and small disadvantaged businesses; and
 - (f) Decreased costs.
- (3) Team arrangements may prove particularly appropriate for research and development (R&D) requirements; however they may be used in other types of acquisitions as well.
- (4) FAA will not normally require the dissolution of team arrangements.
- (5) Guidance on determining small business size standards for team arrangements can be found in AMS Procurement Guidance T3.6.1.

b. *Joint Venture.*

- (1) A joint venture is a separate legal entity, such as a partnership or corporation, formed by two or more parties to conduct business.
- (2) In a joint venture, each party contributes equity and shares:
 - (a) In any revenues;

(b) Expenses incurred; and

(c) In the management or control of the venture.

(3) Joint ventures may be a continuing business relationship or for just one or more projects.

c. Disclosure of Team Arrangements. In order for FAA to recognize the validity of a team arrangement, the arrangement and company relationships must be fully disclosed:

(1) In the offer; or

(2) Before the arrangement becomes effective when formed after the submission of an offer or contract award.

d. Antitrust Law and FAA Rights.

(1) All team arrangements must comply with all applicable antitrust statutes.

(2) Despite any team arrangement, FAA retains the right to:

(a) Require consent to subcontracts;

(b) Determine the responsibility of the prime contractor;

(c) Provide to the prime contractor data rights owned or controlled by the Government;

(d) Hold the prime contractor responsible for contract performance; and

(e) Apply other AMS requirements such as those for competition or subcontracting.

3 Debarment and Suspension Revised 4/2013

a. General.

(1) Debarment and suspension are discretionary actions that are appropriate means to implement FAA policy and should be undertaken only to protect the interest of FAA. Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts. FAA will not solicit offers from, award contracts to, consent to subcontracts, or conduct business with contractors that are debarred, suspended, or proposed for debarment:

(a) In their individual capacities;

(b) As agents or representatives of other contractors; or

(c) As sureties on FAA contracts.

(2) *Compelling Exception.* The FAA will not conduct business with contractors that are debarred, suspended, or proposed for debarment, unless the Administrator, or designee, determines that there is a compelling reason for such action.

(3) *Debarring/Suspending Official.* The Administrator is both the debarring official and the suspending official. However, the Administrator may authorize individuals to act as the debarring or suspending official. The debarring or suspending official is the only individual with the authority to make debarment or suspension decisions.

(4) *Effect on Divisions/Affiliates.* Suspension or debarment applies to all divisions or other organizational elements of the contractor, unless the suspension or debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring and suspending official(s) may also extend the debarment decision to include any affiliates of the contractor if they are:

(a) Specifically named;

(b) Given written notice of the proposed debarment; and

(c) Given written notice of an opportunity to respond.

(5) *Continuation of Current Contracts.* Contractors debarred, suspended or proposed for debarment may continue to perform current contracts or subcontracts, unless the Administrator or designee determines otherwise. However, FAA should not renew or extend the current contract period, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment unless the Administrator, or designee, determines that there are compelling reasons for renewal or extension.

(6) *Ineligible Based on Statute or Regulation.* Contractors declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts and, if applicable, subcontracts under the conditions and for the periods set forth in the statute or regulation.

(7) *Initiating the Debarment/Suspension Action.* When the CO, or requisitioner/program official, determines that cause for debarment or suspension may exist, the information together with any supporting documentation should be provided to the Assistant Chief Counsel for the Procurement Legal Division (AGC-500). AGC-500 will appoint a debarment/suspension officer to investigate whether cause for debarment or suspension exists. The FAA Acquisition Executive will have oversight responsibility and will monitor implementation of the debarment and suspension program.

(8) *The Administrative Record*. The debarment officer will assemble the Administrative Record, which is a consolidated set of records, information, and documentation that clearly demonstrates the basis for the debarment or suspension and the events and actions taken throughout the entire process such as:

(a) Cause for debarment or suspension;

(b) Notice of proposal to debar/suspend;

(c) Contractor's responses, arguments, disputes; (d)

Consideration given to contractor's responses;

(e) Resolution of contractor's comments or disputes, etc.;

(f) Findings of fact;

(g) Other communications with the contractor;

(h) Final report and recommendation to the Debarring Official/Suspending Official;

(i) Debarring/Suspension Official determinations;

(j) Final notice to the contractor/affiliate; and

(k) Notice to the General Services Administration (GSA) regarding the debarment/suspension (see Notices to GSA and System for Award Management (SAM) below). The notice should include the FAA-accepted acronym "DOT- FAA."

(l) Within 45 days of proper notification ("proper notification" is defined as: a referral from the Office of Inspector General that includes either a copy of the Federal, State, or local indictment or civil complaint or other official correspondence or documentation evidencing the indictment or civil complaint from the Department of Justice/United States Attorney. (Internet sources and local newspaper articles as well as unverified news sources are unacceptable for documentation)), FAA will either initiate a debarment or suspension proceeding, or make a decision that a debarment or suspension is not appropriate. If a decision is made not to initiate a debarment or suspension proceeding after proper notice is received, then a justification will be made part of the written record within 45 days after proper notice.

(9) *Scope of Debarment/Suspension*.

(a) Fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may

be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct should be considered as evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent criminal, or other seriously improper, conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct must be evidence of such knowledge, approval, or acquiescence.

(10) *Failure to Disclose Violation of Federal Criminal Law.* Whether or not AMS clause 3.2.5-13 is applicable, a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment until three (3) years after final payment on a contract.

b. *Debarment.*

(1) *Causes for Debarment.* The debarring official should debar a contractor based upon the following:

(a) Conviction of or civil judgment for:

(i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;

(ii) Violation of Federal or State antitrust statutes relating to the submission of offers;

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(iv) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 102-558)); or

(v) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) A preponderance of the evidence for the following:

(i) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:

(A) Willful failure to perform in accordance with the terms of one or more contracts; or

(B) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(ii) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by:

(A) Failure to comply with the requirements of AMS Clause 3.6.3-16, Drug Free Workplace; or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace.

(iii) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see Section 202 of the Defense Production Act (Pub. L. 102-558)).

(iv) Commission of an unfair trade practice as defined herein (see also Section 201 of the Defense Production Act (Pub. L. 102-558)).

(v) Delinquent Federal taxes in an amount that exceeds \$3,000

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(1) The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(2) The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(B) Examples.

(1) The taxpayer has received a statutory notice of deficiency, under I.R.C. §6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(2) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. §6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(3) The taxpayer has entered into an installment agreement pursuant to I.R.C. §6159. The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(4) The taxpayer has filed for bankruptcy protection. The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. 362 (the Bankruptcy Code).

(vi) Knowing failure by the principal, until three (3) years after the final payment on any FAA contract awarded to the contractor, to timely disclose to FAA, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of:

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733);
or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments.

(c) A determination by the Attorney General of the United States, or designee, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989). The Attorney General's determination is not reviewable in the debarment proceedings.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

(2) Debarment Procedure

(a) *Notice Of Proposed Debarment.* If after review of the record and any additional investigation, the debarring official determines that there is sufficient cause for debarment, the debarring official must issue a Notice of Proposed Debarment to the contractor and any specifically named affiliates. The notice should be mailed by certified mail, return receipt requested, stating that debarment is being considered. The notice should also state:

(i) The specific name the firm and any affiliate being considered for debarment;

(ii) That debarment is being considered;

(iii) The reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(iv) The cause(s) relied upon under Section 3.b, Debarment;

(v) That within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(vi) The FAA's process for completing the debarment proceeding;

(vii) The effect of the issuance of the notice of proposed debarment on the contractor; and

(viii) The effect of debarment on the contractor and any affiliates.

(b) *Contractor's Response to the Notice of Proposed Debarment.* The contractor's response will be reviewed to identify issues that could affect the outcome and merit further exploration.

(c) *Mitigating Factors.* The existence of a cause for debarment does not require that the contractor be debarred. The debarring official may consider the following mitigating factors, none of which is by itself dispositive, in determining whether or not to debar a contractor:

(i) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment, or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(ii) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(iii) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(iv) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(v) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(vi) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(vii) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(viii) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(ix) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(x) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

(d) *Debarring Official's Decision.*

(i) *Actions Based Upon a Conviction or Civil Judgment or Without Genuine Dispute Over Material Facts.* In this type of action, the debarring official will consider the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the debarring official should make the decision within 30 working days after receipt of any information and argument submitted by the contractor, or within a reasonable time thereafter.

(ii) *Actions Not Based Upon a Conviction or Civil Judgment.* Where the proposed debarment is *not* based upon a conviction, civil judgment, or indictment, or the contractor's response to the Notice of Proposed Debarment raises a genuine dispute over facts material to the proposed debarment, the debarring official may, upon the request of a contractor:

(A) Provide the contractor an opportunity to appear informally with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(B) Make a transcribed record of the proceedings and make it available at cost to the contractor.

(iii) *Evidentiary Standard for Debarments not Based Upon Conviction or Civil Judgment.* In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(iv) *Demonstrating Responsibility.* If a cause for debarment exists, the contractor has the burden of demonstrating that, notwithstanding the existence of a cause or causes for debarment, the contractor is presently responsible to perform Government contracts.

(v) *Period of Debarment.*

(A) The debarring official should consider the facts and determine a debarment period commensurate with the seriousness of the cause(s) and sufficient to protect the Government's interest. Generally, debarment should not exceed three (3) years, except that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 may be for a period not to exceed five (5) years. Debarments subject to the Immigration and Nationality Act should not exceed one (1) year and

may be extended for additional periods of one (1) year if the Attorney General or designee determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. If suspension precedes a debarment, the suspension period should be considered in determining the debarment period.

(B) The debarring official should extend the period of debarment if that official determines that extension is necessary to protect the Government. However, a debarment may not be extended solely on the basis on the facts and circumstances upon which the initial debarment action was based.

(e) Notice of Debarment to Contractor/Affiliates.

(i) The debarring official will provide the contractor and each affiliate identified for debarment/suspension with a Notice of Debarment/Suspension by mailing the notice by certified mail, return receipt requested. The notice will:

(A) Refer to the Notice of Proposed Debarment;

(B) Specify the reasons for debarment;

(C) State the period of suspension/debarment, including effective dates; and

(D) Advise that the debarment is effective throughout the executive branch of the Government unless the debarring official determines that there are compelling reasons for FAA to continue to do business with the contractor.

(ii) *Debarment Not Imposed.* If debarment is not imposed, the debarring official will promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

c. Suspension.

(1) *Applicability.* Suspension is appropriate when the suspending official determines that immediate action is necessary to protect the government's interest pending the completion of legal proceedings, or the agency investigation of the improper conduct.

(2) *Causes for Suspension.*

(a) The suspending official should suspend a contractor as defined herein, upon **adequate evidence**, of:

(i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, performing a public contract or subcontract;

(ii) Violation of Federal or State antitrust statutes relating to the submission of offers;

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(iv) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by:

(A) Failure to comply with the requirements of the AMS Clause 3.6.3-16, "Drug Free Workplace;" or

(B) Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace;

(v) Intentionally affixing a label bearing a "Made in America" inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States (see section 202 of the Defense Production Act (Pub. L. 102-558));

(vi) Commission of an unfair trade practice as defined herein (see section 201 of the Defense Production Act (Pub. L. 102-558));

(vii) Delinquent Federal taxes in an amount that exceeds \$3,000. See the criteria at T3.2.2.7.A.3.b.(1)(b)(i)(B)(v) for when taxes are considered delinquent;

(viii) Knowing failure by the principal, until three (3) years after the final payment on any FAA contract awarded to the contractor, to timely disclose to FAA, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of -

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733);

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments; or

(ix) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official should upon **adequate evidence** also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

(3) Suspension Procedure.

(a) *Notice of Suspension.* If cause for suspension exists, the suspending official will issue a notice of suspension to the contractor and any specifically named affiliates, if applicable. No hearing is required prior to the imposition of suspension. The notice must be sent by certified mail, return receipt requested, and must state:

(i) That the contractor has been suspended and that the suspension is based upon an indictment or other adequate evidence that the contractor has committed irregularities of a serious nature in business dealings with the Government or seriously reflecting on the propriety of further Government dealings with the contractor. The irregularities must be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(ii) That the suspension is for a temporary period pending the completion of the investigation and such legal proceedings that may ensue;

(iii) The cause relied on for suspension (see Causes for Suspension); (iv) The effect of the suspension on the contractor and affiliates;

(v) That within thirty (30) days after receipt of the notice, the contractor may submit in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional information that raises a genuine dispute over material facts; and

(vi) That additional proceedings may be conducted to determine disputed material facts unless:

(A) The action is based upon an indictment; or

(B) A determination is made, on the basis of Justice Department advice, that the substantial interests in the Government in a pending or

contemplated legal proceeding based on the same facts as the suspension would be prejudiced.

(b) *Suspending Official's Decision.*

(i) In actions that are based on an indictment, in which the contractor's submission does not raise a genuine dispute over material facts, or in which the Department of Justice has denied additional proceedings to determine disputed facts, the suspending official's decision must be based on the administrative record, including any submission made by the contractor.

(ii) In actions not based upon an indictment or actions in which the Department of Justice has not denied additional proceedings, the suspending official may, upon the contractor's request, provide the contractor an opportunity to appear informally with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. At the discretion of the suspending official, a transcribed record of the proceedings may be made and made available at cost to the contractor upon request.

(4) *Other Actions by the Suspending Official.*

(a) *Written Findings.* The suspending official must make written findings of fact and base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(b) *Suspending Official's.* The suspending official may modify or terminate the suspension or leave it in force. However, a decision to modify or terminate a suspension does not prevent any other agency from suspending or debaring the contractor under the same facts or circumstances.

(5) *Period of Suspension.*

(a) Suspensions must be for a temporary period as stated in 3.a. (ii) above unless otherwise terminated sooner by the CO. The CO must notify the Department of Justice (DOJ) of the proposed termination of the suspension at least 30 days prior to the expiration of the initial 12-month period to give DOJ an opportunity to request an extension.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension must be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for another 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(6) *Notices to Contractor/Affiliates.* The suspending official must provide prompt written notice of the decision to the contractor and any affiliates involved.

4 Notices to GSA and SAM Revised 7/2012

a. *Notice to GSA.* The appropriate CO, at the direction of the debarring/suspending official, will provide GSA the information specified below within 5 working days after a debarment/suspension is effective:

- (1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible in alphabetical order, with cross-references when more than one name is involved in a single action;
- (2) The name and official acronym ("DOT-FAA") of the agency or other authority taking the action;
- (3) The cause for the action other statutory or regulatory authority;
- (4) The effect of the action;
- (5) The termination date for each listing;
- (6) The DUNS No; and
- (7) The name and telephone number of the point of contract for the action.

b. *System for Award Management (SAM).*

- (1) GSA operates the web-based SAM. The "Exclusions" portion of the "Performance Information" capability includes the:
 - (a) Names and addresses of all contractors debarred, suspended, proposed for debarment, declared ineligible, or excluded or disqualified under the nonprocurement common rule, with cross-references when more than one name is involved in a single action;
 - (b) Name of the agency or other authority taking the action;
 - (c) Cause for the action or other statutory or regulatory authority;
 - (d) Effect of the action;
 - (e) Termination date for each listing;
 - (f) DUNS No.;

(g) Social Security Number (SSN), Employer Identification Number (EIN), or other Taxpayer Identification Number (TIN), if available; and

(h) Name and telephone number of the agency point of contact for the action.

(2) For information about adding a contractor to SAM, the CO should contact the DOT representative listed under the agency contacts on the SAM website.

5 Prohibition Against Contracting with Inverted Domestic Corporations Revised 10/2015

(a) To be eligible for a contract award ~~when using Fiscal Year 2006 through Fiscal Year 2010 and Fiscal Year 2012 appropriations~~, an offeror must represent it is not an inverted domestic corporation or subsidiary as defined under ~~6 U.S.C. 395 (b) and (c) and 26 U.S.C. 7874~~the [“Definitions” section below](#). Any offeror that cannot so represent is ineligible for contract award ~~using such appropriated funds~~.

(b) Contracting Officers must rigorously examine known circumstances that would lead a reasonable business person to question an offeror’s self-certification and, after consultation with legal counsel, take appropriate action when that questionable self-certification cannot be verified.

(c) *Waiver*. The FAA Administrator may waive the requirements of this Section if the FAA Administrator determines in writing that a waiver is required in the interest of national security, documents the determination, and reports it to Congress.

B Clauses

[view contract clauses](#)

C Forms

[view procurement forms](#)

D Appendix 1 - Definitions Revised 10/2015

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly:

(a) Either one controls or has the power to control the other, or

(b) A third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that:

(a) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(b) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of *nolo contendere*.

"Debarment," as used in this subpart, means action taken by a debarring official to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means:

(a) An agency head; or

(b) A designee authorized by the agency head to impose debarment.

"Excluded Parties List" means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense must be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh- Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

~~"Inverted Domestic Corporation" means a foreign incorporated entity which is treated as anthat meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b) and applied in accordance with the definitions of 6 U.S.C. 395 (c), i.e., a corporation that used to be incorporated in the United States, or used to be a partnership in the United States, but now is incorporated in a foreign country, or is a subsidiary whose parent corporation is incorporated in a foreign country. A foreign corporation is treated as an inverted domestic corporation for tax purposes in accordance with 26 U.S.C 7874, rather than as a foreign corporation, if:~~

~~(a) At least 80 percent of the stock is now held by former shareholders of the domestic corporation or partners of the domestic partnership, and~~

~~(b) The foreign entity plus companies connected to it by 50 percent or more ownership do not have substantial business activities in the foreign country.~~

~~A foreign corporation that is treated as an inverted domestic corporation for U.S. Federal income tax purposes is also treated as one for purposes of this section. A foreign entity that escapes the tax consequences of 26 U.S.C 7874 only because the inversion transactions were filed prior to the March 4, 2003 date is nevertheless treated as an inverted domestic corporation for purposes of this section.~~

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Nonprocurement Common Rule" means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means:

(a) An agency head; or

(b) A designee authorized by the agency head to impose suspension.

"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended."

"Unfair trade practices," as used in this subpart, means the commission of any or the following acts by a contractor:

(a) A violation of Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.

(b) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, *et seq.*) or any similar bilateral or multilateral export control agreement.

(c) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.